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No. PD-1319-19

IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

Carlos Lozano, Appellant

v.

The State of Texas, Appellee

Appeal from El Paso County

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STATE PROSECUTING ATTORNEY'S BRIEF AS AMICUS CURIAE

* * * * *

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

No. PD-1319-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Carlos Lozano, Appellant

v.

The State of Texas, Appellee

Appeal from El Paso County

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A defendant should not be entitled to a self-defense instruction based merely on the act of shooting someone.

STATEMENT OF THE CASE

Appellant was convicted of murder. The court of appeals reversed because of problems with the self-defense instruction. This Court granted review to determine whether appellant was entitled to any instruction on self-defense in the absence of evidence of his subjective belief that deadly force was necessary.

SUMMARY OF THE ARGUMENT

This Court now says that the "confession and avoidance" aspect of self-defense is satisfied by the defendant's lack of denial of the act underlying the offense. The basis for this holding is the jury's ability to infer the culpable mental state from the

act. This practice, while workable and perhaps preferable to continued fights over the existence of an adequate "confession," should not be extended to allow the inference of a defendant's subjective motivation from his act alone. Such an extension would erase that requirement from the statutes and invite verdicts based on speculation.

ARGUMENT

I. This Court allows jurors to infer a defendant's confession to the requisite culpable mental state from the act itself.

In *Ebikam v. State*, this Court reaffirmed its commitment to the application of the "confession and avoidance" doctrine to self-defense.[1] This, despite the apparent absence of language in Section 9.31 that would require it.[2] There is, however, a statutory reason to require it. Section 9.02 explains that Chapter 9 provides "a defense to prosecution" when "the conduct in question is justified."[3] "Conduct," in turn, is defined as "an act or omission and its accompanying mental state."[4] The result is that justification defenses like self-defense are "defined in terms of . . .an act

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[1] *Ebikam v. State*, No. PD-1199-18, 2020 WL 3067581, at *3 (Tex. Crim. App. June 10, 2020) (not designated for publication) ("On the contrary, overruling our confession and avoidance cases would provoke inconsistency and confusion because of the doctrine's extensive influence.").

[2] TEX. PENAL CODE § 9.31(a) ("[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.").

[3] TEX. PENAL CODE § 9.02.

[4] TEX. PENAL CODE § 1.07(a)(10).

or omission and its accompanying mental state[,]"[5] *i.e.*, the culpable mental state for the offense.[6] They should require a confession to both.

Not so. Not only does this Court not require anything approximating a traditional confession,[7] *Ebikam* effectively held that a defendant can obtain a self-defense instruction by doing nothing more than not deny he committed the act. It summarized:

> A flat denial of the conduct in question will foreclose an instruction on a justification defense. . . . But an inconsistent or implicit concession of the conduct will meet the requirement. Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction.[8]

Again, when the Court says "conduct" it means "the act and intent elements of the offense." But because the jury is permitted to infer a defendant's intent from his act even if he denies any intent,[9] the requirement that a defendant confess to the act and intent elements of the offense is really a requirement that he not deny the act.

This is not a bad rule. It is fair to defendants who cannot honestly claim to have formed the requisite culpable mental state in a moment of necessity—or panic.

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[5] *Ebikam*, 2020 WL 3067581 at *3 (citing TEX. PENAL CODE §§ 9.02 and 1.07(a)(10)).

[6] *Juarez v. State*, 308 S.W.3d 398, 405 (Tex. Crim. App. 2010).

[7] *Ebikam*, 2020 WL 3067581 at *5 (Newell, J., concurring).

[8] *Id*. at *3.

[9] *Id*. at *2 (approving of cases like *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989), and *Sanders v. State*, 632 S.W.2d 346 (Tex. Crim. App. 1982)).

It also honors the statute's "use of force" language more than a strict application of "confession and avoidance" would. As far as reconciling all of this Court's self-defenses cases goes, *Ebikam* is about as good as can be expected.[10]

II. This Court should not allow jurors to infer a defendant's subjective motivation from the act itself.

But *Ebikam* is no help in this case, and could cause harm. It, like most self-defense cases from this Court, focused on the admission *vel non* of the act, culpable mental state, or both. The question presented in this case is different: what is required to prove the defendant believed his use of force was immediately necessary? The result should be different, too, based on the statutory language, the jury's limitations, and reality. A defendant's subjective belief should not be inferred from his act alone.

A. Self-defense presents two distinct inquiries.

The plain language of the self-defense statute asks whether "the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."[11] This actually requires the jury to answer two questions. First, did the defendant harbor this subjective belief? Second, was his belief reasonable?

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[10] Ironically, although *Ebikam* says "*Alonzo v. State*, 353 S.W.3d 778 (Tex. Crim. App. 2011), may be the most anomalous of our confession-and-avoidance cases," *Ebikam*, 2020 WL 3067581 at *2, *Alonzo*'s explicit disregard of the elements of the charged offense in favor of a focus on the defendant's *actions* is the best positive example of this Court's current entitlement regime. 353 S.W.3d at 781-82.

[11] TEX. PENAL CODE § 9.31(a).

The subjective inquiry is the threshold question. This Court has long held that "there must be some evidence in the record to show that the defendant was in some apprehension or fear of being the recipient of the unlawful use of force from the complainant."[12] But there's an upside: "[a] person has a right to defend from apparent danger to the same extent as he would had the danger been real; provided he acted upon a reasonable apprehension of danger as it appeared to him at the time."[13] That is one of the reasons it behooves a defendant to tell his side of the story—it is his best opportunity to convince the jury he believed he acted out of self-defense.

The second inquiry is distinct. Once the jury accepts that the defendant harbored a subjective belief, it must determine whether that belief was reasonable under the circumstances as they (reasonably) appeared to the defendant. This is the most important question the jury has to answer for people who claim self-defense in good faith. The jury, sitting as the collective conscience of the community, asks itself what it would have done if it believed as the defendant did. This question is distinct by design. Notably, even the statutory presumptions of reasonableness require the existence of a belief before they can be applied.[14] Allowing the jury to infer the

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[12] *Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).

[13] *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984).

[14] TEX. PENAL CODE § 9.31(a) ("The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if . . ."), § 9.32(b) ("The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if . . .").

existence of a belief because it would (or must) find such a belief reasonable under the circumstances would conflate the two inquiries.

That appears to be exactly what the court of appeals did. At no point does that court discuss the existence of appellant's belief. Instead, every reference is to his "reasonable belief" according to the presumption.[15] Its phrasing, intentional or not, treats the presumption of reasonableness as a directive that the jury find both the defendant's belief and its reasonableness if the requirements of the presumptions are met.[16] In effect, it turned the presumption of reasonableness into a presumption of justification without requiring proof of subjective belief. That erases the requirement of a subjective belief from both the statutes and decades of law.

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[15] Only its quotation of Section 9.32(b) suggests one must exist before the other is found. *Lozano v. State*, No. 08-17-00251-CR, 2019 WL 5616975, at *7 (Tex. App.—El Paso Oct. 31, 2019, pet. granted).

[16] *Id*. at *5 ("The Code, however, provides that in certain factual situations, to be discussed in more detail below, such as when the victim was entering or attempting to enter the defendant's occupied vehicle or home, the jury must presume that a defendant had a reasonable belief that it was immediately necessary to use deadly force to defend himself."), *6 ("However, the very fact that the assault took place through the truck's window requires us to consider the effect of the statutory presumption of reasonableness set forth in the self-defense statute, which, if applicable would require the jury to presume that Appellant's conduct in responding to Hinojos's assault was in fact justified."), *11 ("[B]ecause we find that there was sufficient evidence to support a finding of the existence of all necessary facts giving rise to the statutory presumption of reasonableness, as set forth in the self-defense statute, we conclude that the jury could have found the presumption applicable to Appellant's case, and therefore could have found that Appellant's use of deadly force against Hinojos was justified.").

B. Inferring motive from the bare act would be pure speculation.

From a practical standpoint, allowing a jury to find a defendant's belief in the immediate need to protect himself without any evidence of the his thought process other than his act invites baseless guessing. Inferring intent to kill from shooting at someone is easy enough. Inferring the subjective belief that it was justified is another matter. It requires specific evidence for a jury to consider. Assuming that a defendant who intentionally killed someone must have felt justified because he did it is no different than assuming a mother who intentionally burned her child must have been insane because no sane mother would do that. If a trial court has any role in preventing irrational jury decisions, it should include denying defensive instructions based in this kind of logic.

C. Assuming good motive from the bare act defies reality.

It would be nice if people shot other people only when they genuinely believed it was necessary and lawful. The simple truth is that some people shoot other people because they want to. Sometimes, they use the appearance of justification as an excuse. The Penal Code recognizes this phenomenon in the form of provocation.[17] Even if the admitted (or at least undenied) fact of involvement in an event that caused

[17] TEX. PENAL CODE § 9.31(b)(4) ("The use of force against another is not justified . . . if the actor provoked the other's use or attempted use of unlawful force, unless . . . (A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and (B) the other nevertheless continues or attempts to use unlawful force against the actor[.]").

injury is sufficient to "confess" to the requisite culpable mental state, it should not be enough to prove the defendant harbored the specific belief required by Sections 9.31 and 9.32. Again, allowing the jury to assume it because they believe it would have been reasonable makes the subjective requirement superfluous.

III. Permitting this inference would make a mockery of entitlement law.

Regardless of the merits of or adherence to a traditional "confession and avoidance" model, this Court has tried to balance the ability to present a defense with the need for some semblance of guidance for trial courts trying to avoid irrational verdicts. It might make sense to effectively abandon the need for a confession to the culpable mental state (or even permit explicit denial) so long as a defendant admits an act that implies such intent. It might even make sense to permit that qualified "confession" to be in the form of evidence that at no point came from the defendant's lips. But if subjective belief in necessity can also be inferred from nothing more than the act itself, there is no defendant who cannot obtain a self-defense instruction by simply suggesting it through counsel. That should not be the law.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

/s/ John R. Messinger

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The undersigned hereby certifies that on this 20th day of July, 2020, a true and correct copy of the State's Brief as Amicus Curiae has been eFiled or e-mailed to the following:

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